



POLICE DEPARTMENT CITY OF NEW YORK

June 30, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer James Doheny
Tax Registry No. 950336
30 Precinct
Disciplinary Case No. 2015-14717

Charges and Specifications:

1. Said Police Officer James Doheny, on or about May 31, 2015, at approximately 1920 hours, while on duty and assigned to 30th Precinct, in vicinity of [REDACTED] [REDACTED] New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that he spoke discourteously to [REDACTED] [REDACTED]

P.G. 203-09(2) - PUBLIC CONTACT - GENERAL

Appearances:

For the Department: Jordan Farnham, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street - Suite 640
New York, NY 10038

Hearing Date:

April 12 and May 24, 2017

Decision:

Not Guilty

Trial Commissioner:

ADCT Nancy R. Ryan

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on April 12, and May 24, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Person A as a witness.¹ Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

It is undisputed that on May 31, 2015, at approximately 1920 hours, Respondent, assigned to the 30 Precinct, was on duty at [REDACTED]. While at that address he encountered Person A. The issue in this case is what, if anything, did Respondent say concerning Person A while he was at the location.

Person A, in his interview with a Department Advocate Office investigator on June 16, 2015, stated that he lived at [REDACTED]. On May 31, 2015, as he was exiting his building with two of his friends, Person B and Person C he saw a male and a female police officer, and approximately five to seven kids in the lobby.

¹ Person A walked off the witness stand before his cross-examination could be completed. The case was adjourned once for counsel to present arguments based on this situation and then adjourned a second time based on Person A's representation to Department counsel that he wanted to return to the hearing. On the second adjournment date Person A did not appear until after the Department had rested on their direct case and the Respondent had already testified. The court ruled that Person A's original testimony would not be considered since his cross-examination had not been completed; that Person A would not be permitted to testify after the Department had rested and the Respondent had testified; and that the Department would be allowed to introduce into evidence a transcript and audiotape of Person A's interview by the Department. The court also ruled that counsel would stipulate as to Person A's prior criminal record and that counsel would be allowed to make limited reference in summations to the fact that Person A walked off the stand.

Person A recognized the officers because they had previously given him a summons for smoking marijuana in the building. Person A acknowledged that he smokes marijuana in his building hallway and some people in the building don't like that, so they call the police. (Dep't. Ex. 3B, 5, 8, 10)

Person A told the investigator he exited the building but returned to go to his apartment to get a charger. He got into the elevator and as the door was closing he heard the male officer say to somebody, "do you know what he's been arrested for – for molesting a female." Person A stated he knew the officer was talking about him, "because this is not the first time." (CCRB Ex. 3B, 10) Person A then got back out of the elevator and approached the officers. He asked them what they said and the male officer said, "you heard me...we know you did time for molesting a female." (Dep't. Ex. 3B, 3-5, 11)

Person A described the officer who made the comment as white, in his thirties, a little shorter than 5'7", with a thin build and reddish short hair. (CCRB Ex. 3B, 5-6) He stated he did not have any tattoos. (CCRB Ex. 3B, 6)

Person A stated that he went on his phone and by entering his old inmate number, his prior crimes were listed. He told the officers to look at the list because only robbery and drugs, but not rape, came up. Person A stated that the officer told him his name and said he could take the number in his badge. Person A tried to take a picture of the male officer's badge, but the male officer turned away before he could get the phone camera on. His friends got the officer's license plate number. Person A further stated he went to the precinct and filed a complaint. (CCRB Ex. 3B, 4, 12)

While his statement is a bit unclear, Person A seemed to state that a male Asian officer had previously also told him he saw he had a previous case for "touching a minor." (25, 27)

In Person B's statement to CCRB he said that on May 31, 2015, he was leaving [REDACTED], where he resides, with Person A and Person C when he saw police in the lobby. Person B, Person A and Person C left the building but returned since Person A, "took out his charger." They got back into the elevator to go upstairs. Person B stated that there were a bunch of kids and people in the hallway and the, "cops just started like, oh, don't grow up to be like that guy or don't (unintelligible) that guy 'cause he's being arrested for touching a female." (CCRB Ex. 1B, 2-3) According to Person B, Person A then opened the elevators and asked the police to repeat what they said. Person B stated that, "the cop said clearly -he said, nothing much but I'm just telling these people how they shouldn't be around you 'cause you've been locked up and touching a female." (CCRB Ex. 1B, 3) He further stated that the officer told Person A, "You're a rapo." (CCRB Ex. 1B, 7)

Person B first stated that the officers left after the comment was made but then stated that the police next went into the elevator. (CCRB Ex. 1B, 8-9) When the CCRB investigator asked Person B if the officer made the comments before Person A came back to get his charger, Person B first responded, "Yes," and then stated, "No, no, no. After--wait. Yeah, before. Yeah before. When we were on our way up to get the charger. Yeah. When we came back." (CCRB Ex. 1B, 8-9)

person B said that when Person A asked for the officer's badge number he gave him his number verbally and then turned around when tried to take a picture of it. (CCRB Ex. 1B, 9)

person B described the officer who made the comments as being white, in his early thirties or late twenties, around 5'7", with a husky build and blonde hair. He stated the officer had a tattoo on his arm. (CCRB Ex. 1B, 6) He stated that this officer had given him a ticket in the past for, "being in a park after dark." (CCRB Ex. 1B, 13)

person B also stated that Person A had told him about previous incidents, which he did not witness, where the police had been harassing person A and telling him that he was a rapist. (CCRB Ex. 1B, 5) He also stated that the last time he was arrested the police asked him why he hung around with person A and whether person A flirted with females. (Tr. 12-13,18)

CCRB also offered into evidence an unverified telephone interview with someone who purported to be person D. person D stated that she lived at [REDACTED] and was born in [REDACTED]. She stated that she was with her brother's friends in the lobby of her building on May 31, 2015, when person A came down from the sixth floor. She stated he was with three males. Two officers, a male and a female, then came into the building. She described the male officer as white, about 5'11", blonde, in his mid-thirties and heavysset. person D thinks the male officer said to person A, "here we go again." person A and his friends left the building, but then came back. The officers just asked person D and her friends if they knew these people, referring to person A. When person A came back into the building he said that now he was going to smoke. The male officer said something about person A trying to be funny. person A then said something which person D could not remember. person D stated that the male

officer said, "You know he's been to jail for rape, right?" According to Person D, Person A then said, "no, I did not," and then went with the officers and said, "let's go take a walk to the precinct." (CCRB Ex. 2B, 4-12)

Respondent testified at trial that he has been assigned to the 30 precinct for approximately four years. On May 31, 2015, he was at [REDACTED] in response to numerous complaints of drug use and loud noises. (Tr. 76-77) Respondent testified that he conducted a vertical patrol at this building almost every day he was working. When he entered the building he saw Person A, a person he recognized since he had arrested him for marijuana a few months prior to this date. He testified that he also saw Person A in the vicinity of the building almost every day he worked. (Tr. 78-79, 85) Respondent walked past Person A to conduct the vertical patrol of the building. Prior to entering the elevator, he saw a few children in the lobby and he just said hello to them. (Tr. 79, 84) Respondent entered the elevator and went to the top floor of the building. He conducted his vertical patrol by walking down the stairs to the lobby. (Tr. 86) When he returned to the lobby after about five minutes, he saw Person A re-enter the building. Person A yelled a couple of obscenities towards Respondent, who continued to stand in the lobby. (Tr. 80) When the elevator arrived, Person A went in and then came back out. He was continuing to yell obscenities and asked for Respondent's name and shield, which Respondent gave to him. Person A followed Respondent out of the building. (Tr. 81) Respondent denied ever raising his voice to Person A or ever making any references to his criminal past. He has no idea if Person A had ever been arrested for a sex offense. (Tr. 82)

On cross-examination, Respondent acknowledged that he would have seen Person A's prior record when he made the marijuana arrest. (Tr. 84) He also acknowledged that on all the prior occasions when he saw Person A, Person A never came up to him yelling obscenities at him. (Tr. 86)

Through a stipulation by the parties, a summary of Person A's conviction history was admitted into evidence. He has two felony convictions for Attempted Robbery in the 1st Degree, a felony conviction for Criminal Sale of a Controlled Substance, and misdemeanor convictions for Possession of Stolen Property, Possession of Marijuana (twice), Possession of a Controlled Substance, and Criminal Use of Drug Paraphernalia. He also had an unlawful Possession of Marijuana. (Court Ex. 1)

In this case, I find that the Respondent, who testified in a clear and confident manner on both direct and cross-examination, was credible in his denial of making the comments in question to Person A. In support of Respondent's testimony, it also seems unlikely that Respondent, who, as he testified, had access to Person A's arrest record before the date of this incident, would have chosen to say Person A did time for molesting a female. While Person A clearly does have prior convictions for other crimes, he does not have any prior convictions for sex-related offenses.

I also find that the evidence presented by the Department does not meet the required evidentiary standard of proof by a preponderance of the evidence. The Department is relying on three hearsay statements, one of which is an unverified statement, as proof of the charge in this case. While hearsay is admissible in this proceeding and may be relied on in reaching a decision, it has inherent weaknesses which require that it be carefully evaluated.

In this case, without the benefit of cross-examination of the three witnesses, the court cannot ascertain the relationship of the witnesses to each other, other than noting that they all reside in the same building and that Person A described Person B as a friend. Any potential bias arising out of possible friendships or family relationships could not be explored. The court also cannot have confidence that the witnesses, who do live in the same building, did not in fact confer about their testimony prior to giving their statements. Person B, in fact, stated that Person A had previously provided him with information about his past interactions with the police, so it is quite possible that Person A had similarly provided Person B with information on this incident.

With regard to Person D's statement, first of all, the court cannot be certain that the person speaking to the investigator by phone is Person D. The investigator was not present with Person D to check any identification documents. Also, even if the person on the phone was Person D, since the CCRB investigator wasn't present with her while he was talking to her, there is no way to determine whether or not anyone was conferring with her, or coaching her answers, as she spoke on the phone.

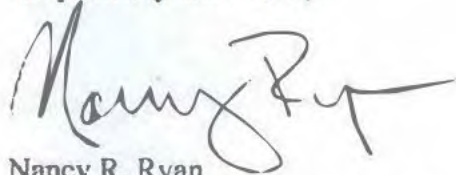
Another area that could not be fully explored with the hearsay statements was bias. Both Person A and Person B stated that they had previously been arrested by the Respondent. These statements on their face, without any testimony to allow the area to be explored further, certainly provide the court with concern that both witnesses would have a bias against Respondent.

In addition, there are other areas of discrepancies among the hearsay witnesses' statements, which call their reliability into question. Some differences in the statements, such as their physical descriptions of Respondent, might possibly be attributable to

different perceptions of height or weight. However, the differences in the description of what Respondent said, go to the central issue of the case. As such, the fact that there are three different versions of the words attributable to Respondent, significantly compromises the Department's case. Person A stated that Respondent said he did time for molesting a female. Person B stated that Respondent said he was being locked up for touching a female and later stated Respondent called Person A a "rapo." Person A never stated that Respondent used this word. Person D's version is that Respondent said, "you know he's been to jail for rape."

Based on the Department's failure to prove the charges by a preponderance of the evidence, I find Respondent, Not Guilty.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

OCT 25 2017

JAMES P. O'NEILL
POLICE COMMISSIONER